The Establishment of an African Court on Human and Peoples' Rights

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I. Introduction

On 9 June 1998, the Assembly of Heads of State and Government of the Organization of African Unity (OAU) adopted a protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court of Human and Peoples' Rights, which has already been signed by 30 states[1]. This step culminates the efforts undertaken within the OAU since 1993, when its Secretary-General proposed the creation of a court to overcome the perceived weaknesses of the African system of human rights protection[2]. The new Court, with jurisdiction over contentious cases and authority to issue advisory opinions as well, bears strong resemblance to the existing regional courts for the protection of human rights, especially the Inter-American Court. Yet it is marked by several particular characteristics which concern the possibility of bringing direct individual complaints before it, the enforcement mechanism, the applicable law, and the role of non-governmental organizations. These matters will be discussed in greater detail after an outline of the present system and the structure of the new court.

II. The Present System

The African Charter on Human and Peoples' Rights was adopted in 1981, entered into force in 1986 and is now ratified by 51 states[3]. It established the African Commission on Human and Peoples' Rights, which started working in 1987[4]. Like the UN Human Rights Committee and the Inter-American Com-

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1 The text of the Protocol is reproduced on p. 727 et seq.

2 See on the development in general I.A. Badawi El-Sheikh, Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, RADIC 9 (1997), 943 et seq.; G.J. Naldi/K. Magliveras, The Proposed African Court of Human and Peoples' Rights: Evaluation and Comparison, RADIC 8 (1996), 944 et seq.; E.A. Ankumah, The African Commission on Human and Peoples' Rights, 1996, 193 et seq.; H. Boukrif, La Cour africaine des droits de l'homme et des peuples, RADIC 10 (1998), 60 et seq.; M. Mubiala, Contribution à l'étude comparative des mécanismes régionaux africain, américain et européen de protection des droits de l'homme, RADIC 9 (1997), 42, at 52 et seq.

3 As of 1 January 1998; cf. the survey of states parties in RUDH 10 (1998), at 66.

4 On the Commission in general see Ankumah (note 2); W. Benedek, Durchsetzung von Rechten des Menschen und der Völker in Afrika auf regionaler und nationaler Ebene, ZaöRV 54 (1994), 150 et seq.; U.O. Umozurike, Six Years of the African Commission on Human and Peoples' Rights, in: Beyerlin [et al.], Recht zwischen Umbruch und Bewahrung – Festschrift für Rudolf Bernhardt (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Bd. 120), 1995,

mission on Human Rights, the African Commission is charged with both the promotion and the protection of the rights set forth in the Charter. Its promotion task is conceived in very general terms and comprises studies and public information as well as the formulation of guidelines for the interpretation of the Charter[5]. But the reporting procedure, essential for the American and the UN system[6], is only in part established by the Charter itself. While the Charter creates an obligation for the member states to report on their efforts to promote human rights[7], it does not empower the Commission to consider these reports. To fill this gap, the Assembly of the OAU later conferred this task upon it[8]. Moreover, the Commission in 1994, after some unsuccessful attempts, itself started to investigate in certain member states[9].

For the protection against human rights violations in specific cases, the Charter sets up two kinds of procedures: On the one hand, states may communicate violations by other states to the Commission[10]. The fact that no such communication has yet been filed[11] corresponds to similar observations in the other systems of human rights protection, where state complaint procedures have also been used rarely[12].

On the other hand, the Commission may, without further declaration by the states parties, receive "other communications" emanating from individuals, groups or organizations. As in the Inter-American system, they do not need to have an individual interest in the case and may therefore present cases on behalf of third persons to the Commission[13]. These communications have to fulfill the admissibility criteria, such as the exhaustion of local remedies[14], and are transmitted to the respondent state before substantive consideration by the Commission. The consequences of the finding that certain rights have been violated, however, are

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635 et seq.; C.A. Odinkalu/C. Christensen, The African Commission on Human and Peoples' Rights: The Development of its Non-State Communication Procedures, Human Rights Quarterly 20 (1998), 235 et seq.; on its practice see R. Murray, Decisions by the African Commission on Individual Communications under the African Charter on Human and Peoples' Rights, ICLQ 46 (1997), 412 et seq.; *id.*, Report on the 1996 Sessions of the African Commission on Human and Peoples' Rights, HRLJ 18 (1997), 16 et seq.

[5] Article 45 of the African Charter on Human and Peoples' Rights (hereinafter: Charter).

[6] On the reporting procedure before the UN Human Rights Committee cf. M. O'Flaherty, Human Rights and the UN, 1996, at 32 et seq.; on the Inter-American system cf. T. Farer, The Rise of the Inter-American Human Rights Regime: No longer a Unicorn, not yet an Ox, Human Rights Quarterly 19 (1997), 510 et seq., at 522 et seq.

[7] Article 62 of the Charter.

[8] Ankumah (note 2), at 79; Umozurike (note 4), at 638.

[9] Ankumah (note 2), at 41 et seq.; on the difficulties see Murray, Report (note 4), at 24.

[10] Articles 49 et seq. of the Charter.

[11] Badawi (note 2), at 945.

[12] Cf. K.J. Partsch, Human Rights, Interstate Disputes, in: R. Wolfrum (ed.), United Nations: Law, Policies and Practice, 1995, vol. 1, 612 et seq.; on the European cases and the problems related to them see J.A. Frowein/W. Peukert, EMRK-Kommentar, 2nd ed., 1996, Article 24 MN 1 et seq.

[13] Article 55 of the Charter; see Benedek (note 4), at 166; Umozurike (note 4), at 639 et seq.

[14] Article 56 of the Charter; cf. Murray, Decisions (note 4), at 418 et seq.; Odinkalu/Christensen (note 4), at 249 et seq.

left unclear in the text of the Charter. Pursuant to Article 58, the Commission can draw the attention of the OAU Assembly only to systematic and gross violations of human rights. The Assembly may then request a further enquiry of the facts and a report containing the findings and recommendations of the Commission. This resembles the procedure of the ECOSOC under resolution 1503[15], and it has led commentators to conclude that all other cases of violations should not be reported to the Assembly[16]. Nevertheless, the Commission has decided to transmit all observations to the Assembly, and the text of its decisions is embodied in the annual report[17]. While the observations on individual cases stay confidential unless the Assembly decides otherwise, the annual report can be published without the Assembly's approval[18]. The revised rules of procedure of 1995 contain further steps to improve the publicity of the work, for example the possibility of issuing press releases about the private sessions of the Commission[19].

In recent years, the Commission has also sought to enhance the effectiveness of the individual petition system by other means[20]. It has followed a more court-like mode of operation by inviting the parties to appear before it and by encouraging them to seek legal representation. Likewise, it has conducted on-site investigations in countries concerned, and the duration of its proceedings has been substantially reduced. States now seem to take the Commission more seriously, which is reflected in their greater readiness to participate in the proceedings and to have themselves represented by very senior legal officers[21].

Until 1997, the Commission received little more than 200 non-state communications[22]. This corresponds to the number of communications received by the UN Human Rights Committee in its first ten years of existence[23], and is not particularly disappointing with regard to the difficult circumstances prevailing in Africa, especially the lack of information and resources of potential applicants. However, it does not even represent one tenth of the number of complaints lodged with the European Commission during its first ten years[24].

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15 Cf. C. Tomuschat, Human Rights, Petitions and Individual Complaints, in: Wolfrum (note 12), 619 et seq., at 621.

16 E.g., Th. Buergenthal, International Human Rights, 1st ed., 1988, at 187 et seq.

17 The Commission began that practice in 1994, see Odinkalu/Christensen (note 4), at 277 et seq.; Ankumah (note 2), at 75; Benedek (note 4), at 159 et seq. It resembles the practice of the UN Human Rights Committee, see M. Nowak, CCPR Commentary, 1993, First Optional Protocol, Article 6, at MN 1 et seq.

18 Article 59 of the Charter; cf. Murray, Decisions (note 4), at 414 et seq.

19 The revised rules of procedure are reproduced in HRLJ 18 (1997), at 154 et seq.; cf. Murray, Report (note 4), at 17.

20 Cf. Odinkalu/Christensen (note 4), at 273 et seq.

21 Ibid., at 274.

22 Badawi (note 2), at 945.

23 Cf. Nowak (note 17), at 900 et seq.

24 Between 1955 and 1964 this number amounted to 2388; see the survey in Frowein/Peukert (note 12), at 987.

Several other factors limit the effectiveness of the Commission's work. The most important is the lack of financial resources and staff. The Secretariat is greatly overburdened, and the Commission has therefore often been forced to have recourse to the help of other organizations[25]. Moreover, doubts arose as to the impartiality of some of its members because they held government posts at the same time or showed other ties to their home governments, which may have led to less forceful action by the Commission[26]. Finally, as the findings of the African Commission often contain only a very short reasoning, conclusions for other cases are hardly to be drawn and their impact is therefore considerably reduced[27].

According to a former chairman of the Commission, the enforcement mechanism has not yet led to significant results[28]. But in single cases some success has been achieved[29], and the recent improvements may justify modest hopes for a greater impact of the Commission's work in the future. Likewise, many of the obstacles still existing for the Commission have been removed for the new Court.

III. The Characteristics of the New Court

Proposals for an African court on human rights date back to 1961, when the African Conference on the Rule of Law, which brought together judges, teachers of law and legal practitioners from 23 African states, invited governments to consider the adoption of an African convention on human rights and the establishment of a court to safeguard the rights enshrined therein[30]. After several approaches to adopt such a convention had failed, the idea to set up a court was raised again in the late 1970s, when the African Charter on Human and Peoples' Rights was negotiated. It was then rejected on the ground that Africans preferred to settle disputes through negotiation and conciliation rather than through contentious proceedings[31]. But the fear of many African states of being subjected to judgments of an international body may have played a similar role[32]. Efforts toward establishing a court were strengthened in the early 1990s when the weaknesses of the procedure before the Commission became apparent. Especially non-

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[25] Cf. Ankumah (note 2), 32 et seq.; Benedek (note 4), at 157; Umozurike (note 4), at 644 et seq.

[26] Cf. Ankumah (note 2), at 18 et seq.; Murray, Report (note 4), at 21 et seq.

[27] Cf. the decisions in HRLJ 18 (1997), at 28 et seq.; Ankumah (note 2), at 75; Murray, Decisions (note 4), at 415.

[28] Badawi (note 2), at 945; see also M. wa Mutua, The African Human Rights System in a Comparative Perspective, Review of the African Commission on Human and Peoples' Rights 3 (1993), 5 et seq., at 9 et seq.

[29] Cf. Umozurike (note 4), at 640.

[30] Cf. Ph. Kunig, The Protection of Human Rights by International Law in Africa, GYIL 25 (1982), 138 et seq., at 144.

[31] Ibid., at 162.

[32] Cf. Ankumah (note 2), at 9.

governmental organizations, such as the International Commission of Jurists, pressed for the creation of a court, and in 1993 the Secretary-General of the OAU publically took up this idea[33]. In 1994 the OAU Assembly formally requested the Secretary-General to convene an experts' meeting to discuss means to enhance the efficiency of the Commission, and particularly the establishment of a court[34]. Three meetings of legal experts took place and finally produced a draft protocol to the African Charter, which was approved with minor changes by the conference of the Ministers of Justice and Attorneys-General of the OAU in December 1997[35]. The OAU Assembly adopted this text unchanged at its meeting in Ouagadougou on 9 June 1998.

1. The structure of the Court

According to the Protocol, the Court will be composed of eleven judges elected by the Assembly of the OAU for a period of six years. Upon their election, the representation of the main regions and legal systems as well as adequate gender representation shall be ensured[36]. By providing for this small size and renouncing the individual representation of each member state, the protocol follows the structure of the Inter-American Court of Human Rights[37], which seems to be wise given the great number of members to the African Charter.

A remarkable difference to other international judicial organs consists in the rule precluding judges of the African Court judges from hearing cases in which their state of origin is involved[38]. The other regional systems for the protection of human rights, as well as the International Court of Justice, ensure the representation of the states involved by the appointment of ad hoc judges or other means[39]. This may provide the courts with a better knowledge of the legal systems of these states, but may likewise lead judges to take sides with their country of origin. The exclusion of those judges therefore improves at least the perception of impartiality of the Court and may represent a reaction to the problems of the Commission in this respect. The strong emphasis on the impartiality and independence of the judges was also reflected in doubts as to whether they should serve on a part-time basis. Due to the lack of resources and the limited workload expected at the beginning, the part-time solution was chosen, but can later be modified by the Assembly[40].

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33 Cf. Benedek (note 4), at 171; Ankumah (note 2), at 194.

34 Cf. Naldi/Magliveras (note 2), at 945.

35 Cf. Badawi (note 2), at 943 et seq.

36 Articles 11–15 of the Protocol.

37 See Articles 52 et seq. of the American Convention on Human Rights (hereinafter: AmCHR).

38 Article 22 of the Protocol.

39 Article 55 of the AmCHR, Article 43 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR).

40 Article 15 para. 4 of the Protocol; see Badawi (note 2), at 948.

2. The jurisdiction of the Court

The Protocol confers to the Court the competence to deliver advisory opinions as well as to decide contentious cases previously considered by the Commission, which strongly resembles, in particular, the Inter-American system. Yet the jurisdiction of the Court is extended further to individual cases brought directly before it, if the state concerned has accepted this competence by a special declaration.

a. Advisory opinions

Advisory opinions by the Court depend on a request by a State, the organs of the OAU, or any African organization recognized by the OAU[41]. This includes, according to the interpretation of an identical provision by the Commission[42], non-governmental organizations. Since the Commission retains its own competence to deliver advisory opinions[43], the relationship between both organs remains unclear. The exercise of their respective competences, each granted in order to ensure a uniform interpretation, could lead to divergent results and weaken the position of both organs. This problem, however, is likely to remain theoretical if they harmonize their interpretations and exercise their discretion in the advisory procedure in a way to avoid double consideration of the same questions[44].

b. Contentious cases after consideration by the Commission

The central contentious proceedings before the Court will concern cases previously considered by the Commission, as in the Inter-American and the earlier European system. Cases can be submitted to the Court either by the Commission itself or by the States involved in the Commission proceedings, but not by individuals or non-governmental organizations even if they have originally communicated the case to the Commission. This corresponds to the provisions of the Inter-American Convention[45] and the original rules of the European Convention[46], but does not take into account the achievements of the 9th additional protocol to the ECHR. Unlike the European Court of Human Rights, however, the African Court is not excluded from considering cases declared inadmissible by the Commission[47].

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41 Art. 4 para. 1 of the Protocol.

42 Cf. Ankumah (note 2), at 26.

43 Article 45 para. 3 of the Charter; see Naldi/Magliveras (note 2), at 948.

44 The discretion of the Court follows from the wording in Article 4 para. 1 of the Protocol ("may"). Whether the Commission also enjoys such discretion is not clearly pronounced by Article 45 para. 3 of the Charter. As other Courts usually enjoy discretion to render advisory opinions, this is to be supposed for the Commission as well. Cf. Article 65 of the Statute of the International Court of Justice.

45 Article 61 of the AmCHR.

46 Article 44 of the ECHR.

47 Article 6 para. 2 of the Protocol, on the European system see Frowein/Peukert (note 12), Article 27, at MN 2.

c. Direct complaints to the Court

The possibility to lodge complaints directly with the Court, without previous consideration by the Commission, is quite unique among the systems of human rights protection. It exists first of all for a State whose national is the victim of a human rights violation[48]. Due to the already mentioned weakness of state complaint procedures, this will remain a rather theoretical possibility.

In contrast, direct complaints of individuals and non-governmental organizations may gain much more significance[49]. But the jurisdiction of the Court with regard to these cases is not established by the protocol alone; it depends on special declarations by the states parties[50]. This requirement was inserted during a later stage of the negotiations, probably in order to increase the number of ratifications by otherwise reluctant states. Previous drafts had instead limited the competence of the Court to consider direct individual complaints to exceptional or urgent cases, or to cases of systematic and gross violations of human rights[51].

The solution finally chosen offers the opportunity for the Court to receive all complaints without such a qualification if the state concerned has made the said declaration. But it may be argued that the previous drafts could have achieved this result faster if the Court were to have adopted an interpretation of "exceptional circumstances" as flexible as the approach of the Commission to the cases transmitted by it to the Assembly[52]. This could, however, have caused major problems of acceptance of the Court by the member states. But given the reluctance of states to make special declarations on individual petitions, as observed in other systems[53], it will still take time until the direct complaint procedure comes into effect.

The protocol leaves several questions open. The first one concerns the criteria for the admissibility of a complaint. For communications to the Commission, these criteria are laid down in Article 56 of the Charter. This provision, however, shall only be "taken into account" by the Court, which falls short of its strict application[54]. This grants the Court some discretion in its decision, which is rather surprising given the relative latitude the Commission already exercises in this respect[55]. In addition to this, the Court may request the opinion of the Commission on admissibility, which is not binding upon it[56].

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[48] Article 5 para. 1 d of the Protocol.

[49] Article 5 para. 3 of the Protocol.

[50] Article 34 para. 6 of the Protocol.

[51] Cf. Badawi (note 2), at 947; Naldi/Magliveras (note 2), at 950 et seq.

[52] See *supra*, II.

[53] In the UN system, most states delayed or renounced on the ratification of the Optional Protocol, cf. Nowak (note 17), at 886 et seq.; in the European system, declarations according to Article 25 of the ECHR were equally made with significant delay. In the Inter-American system, no such declaration is necessary, Article 44 of the AmCHR.

[54] Article 6 para. 2 of the Protocol; cf. Naldi/Magliveras (note 2), at 953 et seq.

[55] Cf. Murray, Decisions (note 4), at 418 et seq., 423; Odinkalu/Christensen (note 4), at 256 et seq.

[56] Article 6 para. 1 of the Protocol.

While it is thus left to the Court to define the precise criteria for the admissibility of cases, the same holds true for the determination of the general relationship between Court and Commission. The protocol only contains a general clause which empowers the Court to lay down in its rules of procedure the conditions under which it shall consider cases brought before it, bearing in mind the complementarity of both organs[57]. Instead of developing such abstract rules, the Court may also transfer single cases to the Commission[58]. These options allow the Court, for example, to decide how to proceed if a case is brought before both itself and the Commission. This may happen if the Commission decides not to transmit a case to the Court, and the individual concerned tries to overcome the restrictions of Article 5 para. 1 of the Protocol by a direct complaint to the Court. If the Court admitted this it would indirectly abolish these restrictions. However, such an approach would be consistent with the role of the individual before the Court once the state concerned has made the above mentioned declaration.

The fact that the Protocol does not clearly indicate criteria for the determination of the respective roles of the organs is due to a lack of agreement within the committees preparing the draft. But this may prove advantageous as it enables the Court to respond flexibly to changing circumstances, e.g. a growing number of cases or a multitude of complaints on one matter. The Court may thus exclude whole categories of cases from its consideration, if they have not been considered by the Commission previously. But it can also decide to consider all cases and leave to the Commission only the promotion of human rights and the consideration of state reports. This would contribute to the effectiveness of the system by saving resources, accelerating procedures, and giving the organs the opportunity to concentrate on specific tasks.

3. Procedure and decision

The Court shall conduct its proceedings in public; it may receive evidence by the parties, and hold enquiries itself[59]. This may include on-site investigations, which represent an effective tool to solve disputes about facts in particular cases. However, for the majority of complaints, they will be of as little importance as in the European and the American systems because of the time and resources needed for such investigations[60].

In grave and urgent cases, the Court also has the power to adopt provisional measures to avoid irreparable harm[61]. The protocol, however, does not contain an express provision on the legal effects of these measures. It stipulates only that the

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[57] Article 8 of the Protocol.

[58] Article 5 para. 3 of the Protocol.

[59] Article 10, and 26 of the Protocol.

[60] Rarely used in the European system, in the American system on-site investigations played a role rather for general reports on specific states than for individual cases, cf. J. Kokott, Das interamerikanische System zum Schutz der Menschenrechte, 1986, at 94 et seq.

[61] Article 27 para. 2 of the Protocol.

member states undertake to comply with the "judgments" of the Court, which could exclude interim "orders". The French text in contrast uses the inclusive notion of "décisions"[62]. The Inter-American Convention contains the same wording and the same difference between the languages[63], which the African Protocol seems to have copied to a large degree intending the same solution as in the American system. In the latter, interim measures are supposed to be binding on the parties[64], so that the same will hold true for the African Court[65]. This conclusion is strengthened by the contrast to the European Convention which does not contain any provision on interim measures. Therefore, the European Court of Human Rights does not consider those measures, at least if taken by the Commission, as binding[66]. If the drafters of the African Protocol had envisaged this result, they would also have omitted provisions on interim measures. As they have included them, they gain binding force; but a clarification of this interpretation would have been desirable.

Besides the determination of a violation of the Charter, the Court's judgment may also contain orders to remedy or compensate the violation[67]. The competence to indicate such measures has already been claimed by the Commission, while not provided for in the Charter[68], and it resembles very much the competences of the Inter-American Court[69]. The European Court, on the other hand, is restricted to the mere determination and fixing of a sum for compensation[70]. Precise orders on how to remedy the violation may especially help to monitor compliance.

4. Enforcement of the judgments

As noted above, the Protocol contains several means to facilitate the enforcement of the Court's judgments, such as the publicity of the procedure and the possiblity of precise orders. In addition, it charges the OAU Council of Ministers instead of the Assembly with the task of monitoring compliance with the Court's orders[71], unlike the case of the Commission. But the Council is not the only organ involved in the follow-up procedure. The Court itself shall, in its annual report, specify which states have not complied with its judgments[72]. Since there is no provision prescribing the confidentiality of this report, it presumably may be

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62 Article 30 of the Protocol.

63 Article 63 para. 2, and 68 para. 1 of the AmCHR.

64 Cf. Th. Buergenthal, Interim Measures in the Inter-American Court of Human Rights, in: R. Bernhardt (ed.), Interim Measures Indicated by International Courts, 1994, 69, at 84 et seq.

65 Naldi/Magliveras (note 2), at 967 et seq.

66 European Court of Human Rights, Judgment of 20 March 1991, A 201, no. 94 et seq. – *Cruz Varas*; see Frowein/Peukert (note 12), Article 25, at MN 52.

67 Article 27 of the Protocol.

68 Cf. Murray, Decisions (note 4), at 431.

69 Article 63 para. 1 of the AmCHR.

70 Article 50 ECHR; Frowein/Peukert (note 12), Article 50, at MN 1.

71 Article 29 para. 2 of the Protocol.

72 Article 31 of the Protocol.

published. This kind of publicity, known from the Inter-American system[73], the ECOSOC procedure[74] and the recent practice of the UN Human Rights Committee[75], represents an important tool to enhance the efficacy of the enforcement mechanism.

5. Entry into force of the Protocol and the budget of the Court

The Protocol shall enter into force when ratified by fifteen member states of the Charter[76]. This number strikes a balance between the greatest possible weight of the Court and its fastest possible establishment[77]. It represents less than one-third of the membership of the Charter, and one may hope that the Court will be able to start work relatively soon. The ratification is in addition facilitated by two factors: one is the already mentioned requirement of a separate declaration for direct individual complaints to the Court, the other the mode of financing the Court. As all expenses shall be borne by the OAU budget, the states adhering to the Protocol are not individually charged[78]. The same mode, however, has led to significant problems of supply for the Commission, and lack of resources is thus likely to represent one of the main obstacles also to the work of the Court.

6. Specific issues

a. The applicable law

The law to be applied by the Court is not restricted to the Charter and the Protocol, but includes every other pertinent human rights instrument ratified by the states concerned[79]. This differs considerably from the provisions on the Commission which shall only "draw inspiration" from other sources of international human rights law[80]. Only the American system comprises a similar competence insofar as the Inter-American Court is empowered to render advisory opinions also on treaties concerning the protection of human rights in the American states other than the Inter-American Convention[81]. The scope of applicable law in the African system, as helpful as it may be for the enforcement of other instruments, raises, however, two problems.

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[73] Article 65 of the AmCHR.
[74] Cf. Tomuschat (note 15), at 621 et seq.
[75] Cf. L.R. Helfer/A.-M. Slaughter, Toward a Theory of Effective Supranational Adjudication, Yale Law Journal 107 (1997/98), 273 et seq., at 345.
[76] Article 34 para. 3 of the Protocol.
[77] On the different proposals see Badawi (note 2), at 949.
[78] Article 32 of the Protocol.
[79] Article 3 para. 1, 7 of the Protocol.
[80] Article 60 of the Charter.
[81] Article 64 of the AmCHR.

The first one concerns the determination of the instruments applicable in a specific procedure. This may be easy in contentious cases, where these instruments are all treaties containing human rights norms in force for the state involved. Difficulties may arise with regard to advisory opinions, as it is then unclear which and how many states must have ratified the relevant instrument. It could thus be argued that only regional instruments or such treaties ratified by all members to the protocol may be subject to interpretation. In this regard, it seems advisable to follow the approach of the American system, because of the similarity of its provisions. As early as 1982, the Inter-American Court interpreted the scope of its competence broadly to include every treaty norm concerning human rights and in force in one or more American states[82].

An additional problem may arise if the interpretation of another treaty by the African Court differs from the interpretation of an organ charged with this task by the treaty itself[83]. For example, the African Court may choose an interpretation of the International Covenant on Civil and Political Rights different from that of the UN Human Rights Committee. This is all the more possible because the interpretation of a rule always depends on the broader conceptions and the cultural background of the interpreter, and an African judge may for example have a specific understanding of the relationship between the individual and the state. The African Charter itself attaches greater importance to community interests than other instruments. The solution of such divergences seems easy from a theoretical point of view: The interpretation of the organ charged by the instrument itself would prevail over the one of an organ established only by some of the parties to it[84]. But there may be factual disadvantages: The authority of the universal organ could be weakened, especially if its enforcement mechanism is less elaborate than the regional one[85]. The Inter-American Court has denied the existence of such a danger essentially on the ground that different interpretations of the same law are common even in national systems and that the impact of advisory opinions is weak anyway[86]. The latter argument is not applicable here because the African Court may interpret other instruments also in contentious cases. The former one is not striking either: National laws can be implemented by force whereas the enforcement of international norms depends on their clarity, which is weakened by divergent interpretations. When interpreting other instruments it will thus be of particular importance for the Court to harmonize its inter-

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82 Inter-American Court of Human Rights, Advisory Opinion of 24 September 1982, OC-1/82, HRLJ 3 (1982), 140 (147 et seq.); see Kokott (note 60), at 131 et seq.

83 On problems with respect to African regional treaties see Naldi/Magliveras (note 2), at 947 et seq.

84 Kokott (note 60), at 133.

85 On this problem in general see Th. Meron, Human Rights Law-Making in the United Nations, 1986, at 131 et seq.; and with an account of more recent cases Helfer/Slaughter (note 75), at 323 et seq., 358 et seq.; R.B. Lillich, Towards the Harmonization of International Human Rights Law, in: Beyerlin [et al.] (note 4), at 453 et seq.

86 *Supra* (note 82), at 152 et seq.

pretation with the approaches of other organs. In this case, the broad scope of applicable law may benefit the other instruments, too, and the decisions of the different organs may reinforce one another[87].

b. The role of non-governmental organizations

The Protocol grants NGOs several important rights in the proceedings before the Court: They may request advisory opinions and address complaints directly to the Court without proving an individual interest, on the condition that the state involved has made the required declaration. This strong role is surprising, especially from a European perspective. Before the organs of the European Convention, only persons claiming to be victims of a violation of their rights under the convention have *locus standi*[88]. The same applies for individual communications to the UN Human Rights Committee under the Optional Protocol to the Covenant on Civil and Political Rights[89]. Only in the American system do NGOs enjoy similar rights as in Africa.

The strong role of NGOs before the African Court reflects the importance they have had for the work of the Commission during the last decade[90], which by far exceeds their weight before other human rights bodies[91]. They frequently exercise their rights to address communications to the Commission, so that more than half of the communications to the Commission emanate from NGOs[92]. This diminishes in some way the factual obstacles for individuals seeking access to the Commission, although the capacities of NGOs are subject to severe, especially financial, limitations. Apart from their efforts in individual cases, the NGOs support the Commission in the performance of its promotional task, e.g. by taking part in the proceedings, by organizing joint seminars and by providing public information[93]. Thus, the important rights of NGOs before the Court follow at least partially from the success of their cooperation with the Commission.

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87 Cf. R. Higgins, Ten Years on the Human Rights Committee: Some Thoughts upon Parting, Eur. Hum. Rts. Law Rev. 1 (1996), 570 et seq., at 574 et seq.; P. van Dijk, General Course on Human Rights, in: Collected Courses of the Academy of European Law, 1995-II, 1 et seq., at 99 et seq.; Helfer/Slaughter (note 75), at 323 et seq.

88 Article 25 para. 1 of the ECHR.

89 Article 1, 2 of the Optional Protocol.

90 Cf. Benedek (note 4), at 154 et seq.; Ankumah (note 2), at 186 et seq.

91 On the role of NGOs in human rights protection in general van Dijk (note 87), at 76 et seq.; D.W. Weissbrodt, The Contribution of International Nongovernmental Organizations to the Protection of Human Rights, in: Th. Meron (ed.), Human Rights in International Law, 1984, vol. 2, at 403 et seq.

92 Ankumah (note 2), at 188; Umozurike (note 4), at 639 et seq.

93 Cf. Ankumah (note 2), at 186 et seq.; Murray, Report (note 4), at 17 et seq.

IV. Effectiveness of the New Mechanism

As shown above, the establishment of the Court removes many weaknesses of the procedure before the Commission. It overcomes the lack of publicity of the Commission's work by providing for public hearings and judgments, and by the possibility for the Court to publically specify the states that do not comply with its decisions. The Court will have the power to order specific measures to remedy human rights violations. Moreover, the optional admission of direct complaints to the Court may accelerate the procedures and save funds if the respective competences of the Court and the Commission are wisely determined in the future. Nevertheless, several obstacles to the effective work of the Court remain. Some of them are to be removed by the states, some by the Court itself. Others concern the circumstances prevailing in Africa and need to be countered by other means[94].

Among the first group of problems, as already mentioned, is the lack of supply of financial and personal resources as experienced by the Commission. Strong efforts in this regard are required from both African and other organizations and states.

Secondly, more frequent use of the new mechanism has to be encouraged. The reticence of potential applicants until now can be explained by several reasons[95]: People concerned often are not aware of the existence of the relevant organs, nor do they possess the means to address them themselves, let alone through a lawyer. The latter problem could be resolved by the generous exercise of the Court's power to provide free legal representation[96], which itself depends, however, on the resources at the disposal of the Court. Due to experiences with their own national legal systems, many people do not have confidence in the judicial enforcement of their rights and interests, or they fear reprisals if they choose to do so. NGOs may help to overcome these fears, and the provisions of the Protocol concerning the protection of persons appearing before the Court may also prove effective[97]. But most important for the encouragement of applications would seem to be the widespread provision of information about the protection system and the decisions of the organs to individuals, groups and national judges[98]. Here again, NGOs have to play an important role, and the Commission's efforts should be intensified.

Finally, important limitations exist for a court-centered system dealing with individual cases, as can be concluded from the experience of other human rights organs. If this mechanism has proved very effective in Europe most of the time, it did not play a significant role in the American system as long as its organs were

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94 For an account of different factors for the effectiveness of international courts, especially in the field of human rights, see Helfer/Slaughter (note 75), at 273 et seq.

95 See also Benedek (note 4), at 167 et seq.

96 Article 10 para. 2 of the Protocol.

97 Cf. Article 10 para. 3 of the Protocol.

98 On the strong efforts of the European Court of Human Rights and also the European Court of Justice in this respect see Helfer/Slaughter (note 75), at 302.

primarily concerned with systematic and massive violations of human rights in authoritarian states and military dictatorships. On the one hand, individual cases were too numerous and facts too disputed, on the other hand, decisions in individual cases did not produce enough international pressure to change the very structures of some states[99]. Similar problems have arisen before the UN Human Rights Committee and also in the European system with regard especially to Greece[100]. Not only the scale of violations, but also the domestic circumstances of the states concerned have been identified as most important factors for the effectiveness of a court-based system: Without domestic institutions such as independent judiciaries and individuals and groups able to express their views and to put pressure on their government, rulings of an international court in individual cases seem to have only limited impact[101].

In Africa, democratic change in many states has advanced considerably, and the Court's decisions can have an important impact on them, while this may not be the case for the remaining authoritarian states. The Commission will therefore have to play an ever more important role in using and furthering the system of country reports, on-site investigations and the provision of information to individuals, groups and domestic institutions[102].

V. Conclusion

Despite these limits of the new institution, the establishment of the African Court on Human and Peoples' Rights represents a major improvement of the African system for the protection of human rights. The Court will be able to influence the situation of human rights protection in many African countries and build upon the achievements of the Commission. For its success, however, the Court needs intensified efforts by the Commission in the fields of human rights promotion and general supervision. A wise determination of the respective competences and a true complementarity of both organs will thus be crucial to the effectiveness of the mechanism. Nevertheless, as the other systems of protection of human rights, the still young African system will need time to develop.

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[99] Cf. Farer (note 6), at 522 et seq.; Th. Buergenthal, Implementation in the Inter-American Human Rights System, in: R. Bernhardt/J.A. Jolowicz, International Enforcement of Human Rights, 1987, 57, at 74 et seq.

[100] Cf. Helfer/Slaughter (note 75), at 329 et seq., 362 et seq.

[101] Cf. A. Moravcsik, Explaining International Human Rights Regimes: Liberal Theory and Western Europe, Eur. J. Int'l Rel. 1 (1995), 157 et seq., at 178 et seq.; Helfer/Slaughter (note 75), at 331 et seq.; J. Donnelly, International Human Rights: a Regime Analysis, International Organization 40 (1986), 599 et seq., at 616 et seq.; on the case of Africa see Benedek (note 4), at 174 et seq.; on the American experience in this regard see Buergenthal (note 99), at 74 et seq.; Farer (note 6), at 540 et seq.

[102] On advisable means in such cases see in general Moravcsik (note 101), at 182 et seq.

Annex

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights

Adopted by the 34th Ordinary Session of the Assembly of Heads of State and Government of the OAU from 8–10 June, 1998

The Member States of the Organization of African Unity hereinafter referred to as the OAU, States Parties to the African Charter on Human and Peoples' Rights:

Considering that the Charter of the Organization of African Unity recognizes that freedom, equality, justice, peace and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples;

Noting that the African Charter on Human and Peoples' Rights reaffirms adherence to the principles of human and peoples' rights, freedoms and duties contained in the declarations, conventions and other instruments adopted by the Organization of African Unity, and other international organizations;

Recognizing that the twofold objective of the African Charter on Human and Peoples' Rights is to ensure on the one hand promotion and on the other protection of human and peoples' rights, freedoms and duties;

Recognizing further, the efforts of the African Commission on Human and Peoples' Rights in the promotion and protection of human and peoples' rights since its inception in 1987;

Recalling resolution AHG/Res.230 (XXX) adopted by the Assembly of Heads of State and Government in June 1994 in Tunis, Tunisia, requesting the Secretary-General to convene a Government experts' meeting to ponder, in conjunction with the African Commission, over the means to enhance the efficiency of the African Commission and to consider in particular the establishment of an African Court on Human and Peoples' Rights;

Noting the first and second Government legal experts' meetings held respectively in Cape Town, South Africa (September, 1995) and Nouakchott, Mauritania (April, 1997), and the third Government Legal Experts meeting held in Addis Ababa, Ethiopia (December, 1997), which was enlarged to include Diplomats;

Firmly convinced that the attainment of the objectives of the African Charter on Human and Peoples' Rights requires the establishment of an African Court on Human and Peoples' Rights to complement and reinforce the functions of the African Commission on Human and Peoples' Rights.

Have agreed as follows:

Article 1. Establishment of the Court. There shall be established within the Organization of African Unity an African Court on Human and Peoples' Rights hereinafter referred to as "the Court", the organization, jurisdiction and functioning of which shall be governed by the present Protocol.

Article 2. Relationship between the Court and the Commission. The Court shall, bearing in mind the provisions of this Protocol, complement the protective mandate of

the African Commission on Human and Peoples' Rights hereinafter referred to as "the Commission", conferred upon it by the African Charter on Human and Peoples' Rights, hereinafter referred to as "the Charter".

Article 3. Jurisdiction. (1) The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.

(2) In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

Article 4. Advisory Opinions. (1) At the request of a Member State of the OAU, the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.

(2) The Court shall give reasons for its advisory opinions provided that every judge shall be entitled to deliver a separate or dissenting decision.

Article 5. Access to the Court. (1) The following are entitled to submit cases to the Court

a. The Commission;

b. The State Party which has lodged a complaint to the Commission;

c. The State Party against which the complaint has been lodged at the Commission;

d. The State Party whose citizen is a victim of human rights violation;

e. African Intergovernmental Organizations.

(2) When a State Party has an interest in a case, it may submit a request to the Court to be permitted to join.

(3) The Court may entitle relevant Non Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34 (6) of this Protocol.

Article 6. Admissibility of Cases. (1) The Court, when deciding on the admissibility of a case instituted under article 5 (3) of this Protocol, may request the opinion of the Commission which shall give it as soon as possible.

(2) The Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter.

(3) The Court may consider cases or transfer them to the Commission.

Article 7. Sources of Law. The Court shall apply the provisions of the Charter and any other relevant human rights instruments ratified by the States concerned.

Article 8. Consideration of Cases. The Rules of Procedure of the Court shall lay down the detailed conditions under which the Court shall consider cases brought before it, bearing in mind the complementarity between the Commission and the Court.

Article 9. Amicable Settlement. The Court may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter.

Article 10. Hearings and Representation. (1) The Court shall conduct its proceedings in public. The Court may, however, conduct proceedings in camera as may be provided for in the Rules of Procedure.

(2) Any party to a case shall be entitled to be represented by a legal representative of the party's choice. Free legal representation may be provided where the interests of justice so require.

(3) Any person, witness or representative of the parties, who appears before the Court, shall enjoy protection and all facilities, in accordance with international law, necessary for the discharging of their functions, tasks and duties in relation to the Court.

Article 11. Composition. (1) The Court shall consist of eleven judges, nationals of Member States of the OAU, elected in an individual capacity from among jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human and peoples' rights.

(2) No two judges shall be nationals of the same State.

Article 12. Nominations. (1) States Parties to the Protocol may each propose up to three candidates, at least two of whom shall be nationals of that State.

(2) Due consideration shall be given to adequate gender representation in the nomination process.

Article 13. List of Candidates. (1) Upon entry into force of this Protocol, the Secretary-General of the OAU shall request each State Party to the Protocol to present, within ninety (90) days of such a request, its nominees for the office of judge of the Court.

(2) The Secretary-General of the OAU shall prepare a list in alphabetical order of the candidates nominated and transmit it to the Member States of the OAU at least thirty days prior to the next session of the Assembly of Heads of State and Government of the OAU hereinafter referred to as "the Assembly".

Article 14. Elections. (1) The judges of the Court shall be elected by secret ballot by the Assembly from the list referred to in Article 13 (2) of the present Protocol.

(2) The Assembly shall ensure that in the Court as a whole there is representation of the main regions of Africa and of their principal legal traditions.

(3) In the election of the judges, the Assembly shall ensure that there is adequate gender representation.

Article 15. Term of Office. (1) The judges of the Court shall be elected for a period of six years and may be re-elected only once. The terms of four judges elected at the first election shall expire at the end of two years, and the terms of four more judges shall expire at the end of four years.

(2) The judges whose terms are to expire at the end of the initial periods of two and four years shall be chosen by lot to be drawn by the Secretary-General of the OAU immediately after the first election has been completed.

(3) A judge elected to replace a judge whose term of office has not expired shall hold office for the remainder of the predecessor's term.

(4) All judges except the President shall perform their functions on a part-time basis. However, the Assembly may change this arrangement as it deems appropriate.

Article 16. Oath of Office. After their election, the judges of the Court shall make a solemn declaration to discharge their duties impartially and faithfully.

Article 17. Independence. (1) The independence of the judges shall be fully ensured in accordance with international law.

(2) No judge may hear any case in which the same judge has previously taken part as agent, counsel or advocate for one of the parties or as a member of a national or international court or a commission of enquiry or in any other capacity. Any doubt on this point shall be settled by decision of the Court.

(3) The judges of the Court shall enjoy, from the moment of their election and throughout their term of office, the immunities extended to diplomatic agents in accordance with international law.

(4) At no time shall the judges of the Court be held liable for any decision or opinion issued in the exercise of their functions.

Article 18. Incompatibility. The position of judge of the Court is incompatible with any activity that might interfere with the independence or impartiality of such a judge or the demands of the office, as determined in the Rules of Procedure of the Court.

Article 19. Cessation of Office. (1) A judge shall not be suspended or removed from office unless, by the unanimous decision of the other judges of the Court, the judge concerned has been found to be no longer fulfilling the required conditions to be a judge of the Court.

(2) Such a decision of the Court shall become final unless it is set aside by the Assembly at its next session.

Article 20. Vacancies. (1) In case of death or resignation of a judge of the Court, the President of the Court shall immediately inform the Secretary-General of the Organization of African Unity, who shall declare the seat vacant from the date of death or from the date on which the resignation takes effect.

(2) The Assembly shall replace the judge whose office became vacant unless the remaining period of the term is less than one hundred and eighty (180) days.

(3) The same procedure and considerations as set out in Articles 12, 13 and 14 shall be followed for the filling of vacancies.

Article 21. Presidency of the Court. (1) The Court shall elect its President and one Vice-President for a period of two years. They may be re-elected only once.

(2) The President shall perform judicial functions on a full-time basis and shall reside at the seat of the Court.

(3) The functions of the President and the Vice-President shall be set out in the Rules of Procedure of the Court.

Article 22. Exclusion. If a judge is a national of any State which is a party to a case submitted to the Court, that judge shall not hear the case.

Article 23. Quorum. The Court shall examine cases brought before it, if it has a quorum of at least seven judges.

Article 24. Registry of the Court. (1) The Court shall appoint its own Registrar and other staff of the registry from among nationals of Member States of the OAU according to the Rules of Procedure.

(2) The office and residence of the Registrar shall be at the place where the Court has its seat.

Article 25. Seat of the Court. (1) The Court shall have its seat at the place determined by the Assembly from among States Parties to this Protocol. However, it may convene in the territory of any Member State of the OAU when the majority of the Court considers it desirable, and with the prior consent of the State concerned.

(2) The seat of the Court may be changed by the Assembly after due consultation with the Court.

Article 26. Evidence. (1) The Court shall hear submissions by all parties and if deemed necessary, hold an enquiry. The States concerned shall assist by providing relevant facilities for the efficient handling of the case.

(2) The Court may receive written and oral evidence including expert testimony and shall make its decision on the basis of such evidence.

Article 27. Findings. (1) If the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.

(2) In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary.

Article 28. Judgment. (1) The Court shall render its judgment within ninety (90) days of having completed its deliberations.

(2) The judgment of the Court decided by majority shall be final and not subject to appeal.

(3) Without prejudice to sub-article 2 above, the Court may review its decision in the light of new evidence under conditions to be set out in the Rules of Procedure.

(4) The Court may interpret its own decision.

(5) The judgment of the Court shall be read in open court, due notice having been given to the parties.

(6) Reasons shall be given for the judgment of the Court.

(7) If the judgment of the Court does not represent, in whole or in part, the unanimous decision of the judges, any judge shall be entitled to deliver a separate or dissenting opinion.

Article 29. Notification of Judgment. (1) The parties to the case shall be notified of the judgment of the Court and it shall be transmitted to the Member States of the OAU and the Commission.

(2) The Council of Ministers shall also be notified of the judgment and shall monitor its execution on behalf of the Assembly.

Article 30. Execution of Judgment. The States Parties to the present Protocol undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution.

Article 31. Report. The Court shall submit to each regular session of the Assembly, a report on its work during the previous year. The report shall specify, in particular, the cases in which a State has not complied with the Court's judgment.

Article 32. Budget. Expenses of the Court, emoluments and allowances for judges and the budget of its registry, shall be determined and borne by the OAU, in accordance with criteria laid down by the OAU in consultation with the Court.

Article 33. Rules of Procedure. The Court shall draw up its Rules and determine its own procedures. The Court shall consult the Commission as appropriate.

Article 34. Ratification. (1) This Protocol shall be open for signature and ratification or accession by any State Party to the Charter.

(2) The instrument of ratification or accession to the present Protocol shall be deposited with the Secretary-General of the OAU.

(3) The Protocol shall come into force thirty days after fifteen instruments of ratification or accession have been deposited.

(4) For any State Party ratifying or acceding subsequently, the present Protocol shall come into force in respect of that State on the date of the deposit of its instrument of ratification or accession.

(5) The Secretary-General of the OAU shall inform all Member States of the entry into force of the present Protocol.

(6) At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5 (3) of this Protocol. The Court shall not receive any petition under article 5 (3) involving a State Party which has not made such a declaration.

(7) Declarations made under sub-article (6) above shall be deposited with the Secretary-General, who shall transmit copies thereof to the State parties.

Article 35. Amendments. (1) The present Protocol may be amended if a State Party to the Protocol makes a written request to that effect to the Secretary-General of the OAU. The Assembly may adopt, by simple majority, the draft amendment after all the States Parties to the present Protocol have been duly informed of it and the Court has given its opinion on the amendment.

(2) The Court shall also be entitled to propose such amendments to the present Protocol as it may deem necessary, through the Secretary-General of the OAU.

(3) The amendment shall come into force for each State Party which has accepted it thirty days after the Secretary-General of the OAU has received notice of the acceptance.